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No. 83-727

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

LAMAR ALEXANDER, Governor of the State of Tennessee, et al.,

Petitioners,

vs.

HERSHEL CHOATE, et al.,

Respondents.

PETITION ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE CENTER FOR INDEPENDENT LIVING--SAN GABRIEL/POMONA VALLEYS, DISABLED RIGHTS UNION, SOUTHEAST CENTER FOR INDEPENDENT LIVING

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INTEREST OF AMICI

The amici are three Southern California independent living centers which are disabled run and controlled nonprofit organizations. Written permissions from petitioners and respondents for amici participation have been filed with the court. The independent living cen-

ters work toward the realization of the right of persons with disabilities to develop to their potential, to live with dignity and as independently as possible, and to live and contribute in the mainstream of society. These independent living centers and their constituents include persons who are dependent on Medicaid (in California called Medi-Cal) for their health care and who are at risk of needing extended inpatient hospital coverage to preserve their lives and level of functioning. Many very severely disabled Californians are alive and living independently in their communities rather than in institutions because cutbacks in California's Medicaid program have preserved equal access on the basis of Medical necessity and have avoided a design which disparately impacts on an affected class defined in

terms of the nature and severity of their handicaps.[1] Amici fear the consequences of a holding that the grossly disparate impact of Tennessee's 14-day hospital limitation does not constitute discrimination on the basis of handicap and a violation of §504 of the Rehabilitation Act, 29 U.S.C. §794. Such a holding would put at risk the lives and independence of disabled SSI recipients by licensing Medicaid designs which disparately impact upon them on the basis of handicap.

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[1] Severely disabled Californians are more likely to be living in the community outside of institutions than is the case in other states. For instance, although California has only 10% of the United States' population, per HHS Health Care Financing Agency (HCFA), half this Country's population of respirator-dependent persons who are living in the community and who are also eligible for Medicare are living in California. A nondiscriminatory California Medicaid program is one of the reasons severely disabled Californians are better able to avoid than are severely disabled living elsewhere.

CENTER FOR INDEPENDENT LIVING--SAN GABRIEL/POMONA VALLEYS in West Covina works with persons with disabilities in the communities east of Los Angeles in the San Gabriel and Pomona Valleys;

DISABLED RIGHTS UNION in Ventura works with persons with disabilities in Ventura County to the north of Los Angeles;

SOUTHEAST CENTER FOR INDEPENDENT LIVING (SECIL) in Downey works with persons with disabilities in the Southeast portion of Los Angeles County which includes some twenty cities such as Downey, Compton, Bell, Bell Gardens, Southgate.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act, 29 USC §794, protects otherwise qualified handicapped individuals from the injurious effects of practices and program designs even though the practice or design was not undertaken for the purpose of injuring handicapped persons. Challenged here is the design of Tennessee's Medicaid inpatient hospital services program which limites coverage of hospital days to 14 in any one fiscal year. Respondents/Plaintiffs and those they represent are all "Otherwise Qualified Handicapped Individuals" because they are entitled to Medicaid because they receive Supplemental Security Income (SSI) based on disability and because they have or will meet the state's medical necessity criteria for coverage of inpatient hospital services.

The 14-day limitation has the effect of denying otherwise qualified handicapped individuals Medicaid coverage of necessary hospital services solely because the nature and severity of their handicaps require more than 14 days in a fiscal year. Although the Medicaid statute when read together with §504 impose an obligation on the state to consider the foreseeable consequences on handicapped persons when designing a program, the state failed to do so. Plaintiff's statistics showed a gross disparity of 28 standard deviations between the adverse effect of the 14-day limitation on the handicapped as opposed to the nonhandicapped hospital user population. The grossness of the disparity is evidence that the adverse effect was by reason of handicap and gives rise to a presumption that the affected class was adversely impacted upon by reason of

their handicap. If unrebutted, the burden of persuasion shifts to the Petitioner/Defendant to show that the program design is justified--just as a justification burden would shift to a defendant if a campus library were designed so as to exclude mobility impaired students who were otherwise qualified handicapped individuals.

A R G U M E N T

I.

THE WELL SETTLED LAW DEVELOPED BY THIS COURT ON ELEMENTS OF PROOF AND BURDENS OF PERSUASION AND PRODUCTION AS APPLIED TO § 504 DICTATE AFFIRMANCE OF THE CIRCUIT COURT DECISION.

A plaintiff's proof burden is determinable by parsing the language of the statute itself -- "§504 [29 U.S.C. §794] sets forth its own criteria for scrutinizing claims under that statute." Southeastern Community College v. Davis,

442 U.S. 397, 403, 99 S.Ct. 2361, 2365 (1979). Section 504 states

> No otherwise qualified handicapped individual... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

A. "any program or activity receiving Federal financial assistance"

Applicability of § 504 and the court's jurisdiction was undisputed because of the substantial financial involvement in the state's Medicaid program.[2]

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[2] Jennings v. Alexander, 518 F.Supp. 877, 880 (M.D. Tenn. 1981).

B. "otherwise qualified handicapped individual"

There are two sub-elements here: first, whether the plaintiff is a member of the protected class, and second whether the plaintiff is "otherwise qualified".

1. "handicapped individuals"

The protected class is defined at § 7(7)(B) of the Rehabilitation Act, 29 U.S.C. § 706(7)(B). It is undisputed that plaintiffs herein -- and those they sought to represent -- are all protected class members.[3] Plaintiffs and those

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[3] Jennings v. Alexander, supra, 518 F.Supp. at 880. Plaintiffs and those they represent fall within the first clause of the definition of handicapped in § 7(6)(B) of the Rehabilitation Act, 29 U.S.C. § 706(7)(B), in that each "has

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they sought to represent were disabled SSI recipients, a class that is bright-line defined in terms of the nature and severity of their disability.[4]

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a physical or mental impairment which substantially limits one or more of such person's major life activities...." While the first and second clause ("a record of such an impairment") cover persons who may be objectively defined as being within the protected class, the third clause ("regarded as having such an impairment") would cover only those persons who are defined as handicapped by a program's adverse action.

[4]All § 504 cases addressing systemic problems have involved affected classes defined in terms of the nature and severity of their disabilities. For instance, a case involving lack of ramp access to a school library involves discrimination against a class defined in terms of the nature and severity of its members handicap: persons whose disability involves a mobility impairment which is so severe as to prevent use of steps. The lack of stairs would disparately impact upon an affected class defined in terms of the nature and severity of its members'

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2. "otherwise qualified"

This element is satisfied by showing that a plaintiff "meets the essential eligibility requirements for the receipt of" Medicaid inpatient hospital services. 45 C.F.R. § 84.4(k)(4) (1983).

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handicapping conditions. The affected class in New Mexico Association for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (10th Cir. 1982) were those otherwise qualified handicapped children who, because of their disability limitations, were unable to obtain system benefits realized by the non-handicapped -- again a class defined in terms of the nature and severity of its members' handicaps.

Plaintiffs and those they sought to represent[5] meet the essential eligibility requirements of the Medicaid inpatient hospital services program by virtue of their SSI status and by virtue of their demonstrated need for such inpatient services under the State Medicaid program criteria. Plaintiffs' otherwise qualified status also bright line defines the class they seek to represent. The affected class -- those otherwise qualified handicapped individuals who have or in the future will

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[5]Brief of Amicus Equal Employment Advisory Council (EEAC), discussions about the heterogeneity of the class protected by § 504 and arguments about why adverse impact statistics can never be used in a § 504 case overlooks the "otherwise qualified handicapped individual" step in the proof process. In most employment cases -- the type of cases the EEAC focuses on in its arguments -- the dispute is whether or not an applicant is "otherwise qualified." Adverse impact statistics simply do not come into play in such a case.

require more than 14 days of inpatient services by reason of their handicap -- is also bright-line defined.[6]

C. "solely by reason of his handicap"

Plaintiff is required to show a nexus between the adverse action and plaintiff's handicap or status as a person with a handicap. The "by reason of" language is comparable to the "because of" language in §703 of Title VII of the civil rights act of 1964, 42 U.S.C.

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[6] In Title VI national origin discrimination cases affected classes have been defined much more restrictively than suggested by the designation "national origin" -- as the non-English-Speaking Chinese pupils who were effectively foreclosed from access to the educational opportunities offered by the San Francisco public school system. Of the total of 2856 Chinese students with language deficiencies, about 1,000 received suplemental instruction and 1,800 received nothing. Lau v. Nichols, 414 U.S. 563, 564-66 and n.1 (1974).

§2000e-2 (1983),[7] and the Fair Housing Act "because of" language in 42 U.S.C. §3604(a), Title VIII of the Civil Rights Act of 1968.[8] Just as violations of Title VII and Title VIII may be shown by demonstrating the discriminatory effect of a challenged practice as well as by demonstrating discriminatory intent, so too violations of §504 may shown by demonstrating the discriminatory effect of a practice. As discussed below, statistics showing a gross or substantial impact on the basis of disability may give rise to a presumption of a nexus -- that is, that the grossly

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[7] Albermale Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431-432 (1971),

[8] Resident Advisory Board v. Rizzo, 564 F.2d 126, 148-150 (3d Cir. 1977), cert denied, 435 U.S. 908 (1978); Metropolitan Housing Dev. Corp. v. Village of Arlington Hts (Arlington II), 558 F.2d 1283, 1287-1290 (7th Cir. 1977) Cert. denied 434 U.S. 1025 (1978).

disparate need for more than 14 days of hospitalization is because of their handicapped status. By showing that the injury is by reason of handicap and by showing that the plaintiff is an "otherwise qualified handicapped individual," the plaintiff has satisfied by elimination the "solely" part of this element.

D. Adverse action cognizable under § 504

The breadth of the scope of § 504 and the adverse actions it reaches is reflected in its language as well as by the Health & Human Services regulation which Tennessee agreed to be bound by as a necessary condition to receiving federal financial assistance under the Medicaid program.[9]

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[9]See excerpts from the HHS § 504 Regulations, 45 C.F.R. Part 84, set out in the appendix.

1. "excluded from participation in" a federally assisted program

The program design absolutely excluded from participation in the Medicaid-covered inpatient hospital services program a group of persons defined in terms of the nature and severity of their handicap: otherwise qualified handicapped individuals who had used 14 days of inpatient hospital services in the relevant fiscal year and whose disability related medical need for inpatient services was comparable to or greater than the medical need of persons who were receiving inpatient hospital services under the program.

2. "denied the benefits of" a federally assisted program

The program design denied a class of otherwise qualified handicapped indi-

viduals defined in terms of the nature and severity of their disabilities the statutorily defined benefit of the State's Medicaid coverage of inpatient hospital services: coverage of medically necessary inpatient hospital services.[10] Such a class of otherwise qualified handicapped individuals was denied access to program benefits which were as effective as those enjoyed by their less disabled or nondisabled peers.

3. "subjected to discrimination under" a federally assisted program

The program design discriminated against the more severely handicapped segment of the Medicaid recipient popu-

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[10] See discussion at section II infra.

lation by shifting to their shoulders a disproportionate share of the overall cost burdens of medically necessary inpatient hospital services. The Tennessee Medicaid inpatient hospital services program would cover postponable elective surgery for someone who had not used up 14 days in one fiscal year, but would not cover disability related hospital services needed to preserve life or level of functioning if the otherwise qualified handicapped individual had used up his 14-day allotment.

4. Recipients are required to take affirmative steps to remedy the effects of discrimination.

Defendants/Petitioners contend that this Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), demonstrates that § 504 does not require the provision of any affirmative

relief to eliminate the effects of discrimination against handicapped persons. That contention is wrong for several reasons.

Any statements in Davis remotely suggesting that Section 504 does not require affirmative remedies to eliminte discrimination against handicapped beneficiaries of federal programs must be read in light of Conrail v. Darrone, 104 S.Ct. 1248 (1984), in which this Court expressly held that amendments to the Rehabilitation Act, adding § 505 to the Act; 29 U.S.C. § 794a, incorporated into the Act the HEW regulations under § 504. Id., 104 S.Ct. at 1255. See 45 C.F.R. part 84. Those regulations, in addition to requiring aids and services to affirmatively accomodate the needs of handi-

capped persons,[11] specifically require "remedial action," defined by the regulations as actions "necessary to overcome the effects of the discrimination." 45 C.F.R. §84.6. Leaving no room for gainsaying, HEW's official commentary to this section states:

> Remedial action. Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees, and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court

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[11] E.g., 45 C.F.R. §84.11(b) (requiring that facilities be made architecturally accessible); id. § 84.34(a) requiring "supplementary aids and services" to enable handicapped children to be educated in a regular educational environment); id. §84.44(d) (requiring auxiliary aids for handicapped college students); id. §84.52(d) (requiring auxiliary aids for handicapped beneficiaries of larger health, welfare, and social services agencies).

> action or termination of federal financial assistance may be imposed.
>
> Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed.

45 C.F.R. part 84, Appendix A, ¶9.

In codifying this regulation, "Congress apparently determined that it would require...grantees to bear the costs" of eliminating discrimination against handicapped beneficiaries "as a quid pro quo for the receipt of federal funds." Conrail, 104 S.Ct. at 1254 n. 13.

Moreover, the sole issue actually determined by the Court in Davis was

whether Ms. Davis was "otherwise qualified" within the meaning of Section 504.[12] The Court thus did not decide the issue presented here, whether plaintiffs, who unquestionably satisfy all pertinent eligibility criteria under the Title XIX and state regulations, and thus are "otherwise qualified," have established a prima facie case of discrimination under Section 504.

It is manifest that the Court's holding in Davis was limited to the "otherwise qualified" issue. The court noted that "on the present record it appears unlikely respondent could benefit from any affirmative action" that

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[12]Judicial decisions discussing this question uniformly have recognized that the holding in Davis dealt only with the issue of whether plaintiff was "otherwise qualified." E.g., New Mexico Association for Retarded Citizens v. State of New Mexico, 678 F.2d 847, 853-54 (10th Cir. 1982); S-1 v. Turlington, 635 F.2d 342, 349-50 (5th Cir. Unit B, 1981), cert. denied, 454 U.S. 838 (1982).

the defendant college might have undertaken. Thus, the Court observed, even if such relief had been ordered, Ms. Davis "would not receive even a rough equivalent of the training a nursing program normally gives." Id. at 409, 410. For these reasons, the Court concluded that Ms. Davis would be unable to participate in the nursing program in any event, see id. at 407, and that she was therefore not an otherwise qualified handicapped individual. See id. at 406, 407.

Moreover, the language of the Davis decision is in fact consistent with the holding of Conrail. In Davis, the Court states:

> If [the HEW] regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504.

442 U.S. at 410 (emphasis supplied). This language plainly recognizes that "adjustments in existing programs" may be required in some circumnstances by Section 504 when "necessary to eliminate discrimination against otherwise qualified individuals." Importantly, the Court noted that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." Id. at 412-13.

Finally, Petitioner also miscontrues the Court's observation in Davis that § 504, unlike §§ 501 and 503 of the Rehabilitation Act, does not refer to affirmative action. ID. at 442 U.S. at 410. To say that § 504 does not impose an affirmative action requirement, however, does not mean that Section does not require measures "to overcome the effects of discrimination" against handicapped persons, 45 C.F.R. § 84.6,

"includ[ing] provision of services to persons previously discriminated against," id., Appendix A, ¶9.

E. Burdens of Persuasion and Production in Plaintiff's § 504 case

A plaintiff of course would have the burden of proof with respect to any disputed element in plaintiff's case. Once the plaintiff submits evidence from which the trier of fact could find for the plaintiff with respect to such disputed elements,[13] the defendant would then have the burden of going forward with evidence legally sufficient to rebut the inference. Of course, the burden of persuasion would remain with the plaintiff.[14]

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[13] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-255 and n. 7, 8, 10 101 S. Ct. 1089, 1094-95 (1981).

[14] Id.

F. Burden of Persuasion shifts to Defendant with respect to Affirmative Defenses

Once plaintiff overcomes any rebuttal evidence and satisfies the trier of fact that he (or he and the class) is an "otherwise qualified handicapped individual" who, "solely by reasons of his handicap," has been "excluded from the participation in, ... denied the benefits of, or ... subjected to discrimination under any [federally assisted] program," the plaintiff has met his burden of persuasion. At that point a burden of persuasion is shifted to the defendant to show that the action was nonetheless justified.[15] Analysis of proof

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[15] New York Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649-650 (2d Cir. 1979) (school board "obliged to make at least some substantial showing" that exclusion of Hepatitis B carriers justified); O'Connor v. Board of Education of School District 23, 449

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related to this stage was not reached below because the trier of fact concluded, inter alia, that the plaintiffs

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U.S. 1301, 1305, 101 S.Ct. 72, 74 (1980) (Justice Stevens as Circuit Justice) (Once plaintiff established school refused to allow her to try out for the boy's team solely because she is female, burden of justification on defendants); Resident Advisory Board v. Rizzo, 564 F.2d 126, 148-150 (3d Cir. 1977) cert. denied, 435 U.S. 908 1978) (under Title VIII, 42 U.S.C. §§ 3601 et seq., §3604(a), once plaintiff establishes discriminatory effect, burden of establishing justification shifts to defendant; "a justification must serve, in theory and practice, a legimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interst to be served with less discriminatory impacts").

had not made out a prima facie case.[16] In order to show that otherwise discriminatory action was necessary, a defendant may be required to show that the foreseeable consequences of the program design on the protected class were considered and that no alternative design with lesser adverse consequences that met the program's necessary and legitimate needs had been identified. By way of rebuttal, plaintiff could identify less discriminatory alternatives which could defeat defendant's evidence that the program design was justified by necessity.

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[16] Jennings v. Alexander, supra, 518 F.Supp., at 881 ("the court finds that the plaintiffs have failed to carry their burden of establishing that the limitation of 14 days of hospital coverage will in fact have a discriminatory impact upon handicapped Medicaid recipients").

II.

THE INPATIENT HOSPITAL SERVICES PROGRAM IS NOT A FLAT VOUCHER PROGRAM; RATHER IT IS A PROGRAM WHICH COVERS THE COST OF SUCH SERVICES BASED ON NEED.

Equal access to program benefits for purposes of § 504 is defined by looking first at the program itself, including the program objectives against which the program's activities are measured. This Court in Southeastern Community College v. Davis, 442 U.S. 397, 408-410, 99 S.Ct. 2361, 2368-69 (1979), defined the benefits of the nursing course of study in terms of the program's training objectives. The scope of the overall Title XIX Medicaid program and of the particular program at issue herein -- inpatient hospital services[17] -- and

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[17] "inpatient hospital services (other than services in an institution for tuberculosis or mental diseases)," 42 U.S.C. § 1396d(a)(1) (1983); Cf. Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979)
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eligibility requirements is defined by Title XIX. Title XIX defines the purpose at 42 U.S.C. § 1396 which provides in relevant part:

> enabling each State, as far as practicable under the conditions in such state, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, ...

Inpatient hospital services is one of five mandatory services Title XIX requires participating states to cover.[18] Persons who are categorically

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(Footnote from previous page) (for purposes of determining whether or not a person was denied equal access or otherwise discriminated against with respect to Medicaid inpatient hospital services, look to the Medicaid statute to define the scope of the particular program at issue).

[18] Inpatient hospital services; outpatient hospital services including rural health clinic services; laboratory and x-ray services; skilled nursing facility services, early and periodic screening for persons under age 21, family planning services; physicians' services. 42 U.S.C. § 1396d(a)(1)-(5).

needy -- recipients of Supplemental Security Income (SSI)[19] and Aid To Families with Dependent Children (AFDC)[20] -- are required to be covered.[21]

The "language [of the statute[22]] confers broad discretion on the States

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[19]Title XVI of the Social Security Act, 42 U.S.C. § 1381 et seq.

[20]Title IV of the Social Security Act, 42 U.S.C. § 601 et seq.,

[21]42 U.S.C. § 1396a(a)(10)(A)(i). At the State's option persons who are medically needy may also be covered: Persons who would be eligible for one of the categorical programs but for income -- e.g., a recipient of Social Security Disability Income (SSDI) under Title II of the Social Security Act, 42 U.S.C. § 401 et seq., in an amount above the SSI grant level but who meets all the other eligibility requirements of SSI. 42 U.S.C. § 1396a(a)(10)(A)(ii) (1983).

[22]"A State plan for medical assistance must ... include reasonable standards .. for determining eligibility for and the extent of medical assistance under the plan which ... are consistent with the objectives of this [Title]...." 42 U.S.C. § 1396a(a)(19) (1983). "A State plan for medical assistance must ... provide such safeguards as may be

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(Footnote cont from previous page) necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients." 42 U.S.C. § 1396a(a)(17) (1983).

A court reviewing a state plan -- including a 14-day limitation on inpatient hospital services -- under Title XIX alone presumes conformity if the standard "is 'not irrational or arbitrary and counterproductive to the medical well-being of all Medicaid recipients.'" Jennings v. Alexander, 715 F.2d 1036, 1045 (6th Cir. 1983), citing Budnicki v. Beal, 450 F.Supp. 546, 557 (E.D. Pa. 1978), and Philadelphia Welfare Rights Organization v. O'Bannon, 517 F.Supp. 501, 508 (E.D.Pa. 1981), aff'd, 681 F.2d 808 (3d Cir. 1982). However, § 504 introduces another factor into the reasonableness calculus: A requirement that consideration be taken of the impact on the handicapped -- here the disabled SSI recipients. Under § 504 the State's failure even to consider the foreseeable impact of the 14-day limitation renders the limitation unlawful:

> Agencies' actions must be rational and reasonable, and in order to assure that their actions are not arbitrary, agencies must pay adequate attention to all factors made relevant and material by the statutes under which they operate. See, generally, 4 K.Davis, Administrative Law Treatise, §§ 29.00-29.00-5 (Supp. 1982), and cases cited therein; Pierce & Shapiro,

to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act. *** [However,] serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment...." Beal v. Doe, 432

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Political and Judicial Review of Agency Action, 59 Tex. L.Rev. 1175, 1180-89 (1981).

Thomas v. Johnston, 557 F.Supp. 879, 910 (W.D. Tex. 1983). See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 412, 416 (1971) (determining whether agency action was arbitrary or capricious requires consideration of whether based on relevant factors); Illinois Hosp. Ass'n v. Illinois Dep't of Public Aid, 576 F.Supp. 360 (N.D. Ill., E.D. 1983) (preliminary injunction based on likelihood of prevailing on claim that hospital rates are arbitrary and unreasonable because failed to consider factors identified in statutes); California Hosp. Ass'n v. Schweiker, 559 F.Supp. 110 (C.D. Cal. 1982) (hospital rates invalid as arbitrary and capricious because of failure to consider all relevant factors).

U.S. 438, 442, 97 S.Ct 2366, 2370, 53 L.Ed.2d 464 (1977). Only necessary care and services are to be provided under the state Medicaid plan. "A State plan for medical assistance must ... provide such methods and procedures relating to the utilization of ... care and services available under the plan ... as may be necessary to safeguard against unnecessary utilization of such care and services...." 42 U.S.C. § 1396a(a)(30) (1983).

The State's and United State's characterization of the program is wrong in several respects. First, it is not a program comparable to a voucher program where a fixed, across-the-board sum is given to be spent, if needed, in the medical marketplace.[23] Rather the

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[23] Brief of United States, p. 13: "Suppose Tennessee were to decide that it wished to give each of its citizens $100, to be spent on health care, ..."

dollar amount actually expended on inpatient hospital services under the Medicaid program is based on individual need: the level of acute care (i.e., regular or intensive care unit), the number and kinds of support and monitoring machines the patient is hooked up to, the types of services and treatment provided, the number of days needed, and the hospital billing rates.[24]

Second, the State, despite the United States' representations to the contrary,[25] does not have an unfettered discretion to define the "benefits" of its Medicaid program. While the State's discretion with respect to "reasonableness" and recipients' "best interests"

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[24]Thus two people needing the same number of inpatient days may end up with widely divergent inhospital services costs.

[25]Brief of United States, pp. 12-13.

may be insulated from judicial scrutiny under Title XIX alone by an "arbitrary and capricious standard,"[26] under § 504 and given the impact on individual otherwise qualified handicapped individuals[27] who are and will be hurt by the 14-day limitation solely because of the nature and severity of their handicapping conditions, those provisions are

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[26]See discussion at note 22, supra.

[27]Although the disparate impact of the program design is demonstrated statistically, it is otherwise qualified handicapped individuals who are hurt by the program design solely because of the nature and severity of their handicapping condition. Their right to be free of discrimination cognizable under § 504 is an individual right just as the right to be free of discrimination cognizable under Titles VI and VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq., §§ 2000e et seq, is an individual right. Regents of the University of California v. Bakke, 438 U.S. 265, 416 n.19 (1978) (Stevens-Burger-Stewart-Rehnquist opinion, individual character of Title VI rights); City of Los Angeles, DWP v. Manhart, 435 U.S. 702, 708 (1978) (Title VII, "statute's focus on the individual is unambiguous").

looked at under a civil rights glass and their substantive content given effect to define the program and the benefits thereunder.

Third, designing the program so that all Medicaid recipients have comparable coverage of their medically necessary inpatient hospital services[28] does not mean that those with minimal hospital usage needs are "subsidizing" those disabled SSI recipients whose disabilities require hospitalization in excess of 14 days.[29] Similarly the Defendant in

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[28]Comparable coverage within the state defined fiscal limitations are matters to be addressed as part of defendants' affirmative defense case. The plaintiffs had identified a less discriminatory alternative which would, apparently, mesh more efficaciously with Hill-Burton funded inpatient hospital services. Adoption of a more restrictive definition of medical necessity is another cost containment stratagem used more frequently than the fixed-day limitation stratagem sought to be employed here.

[29]Brief of the United States, pp. 22-25.

Mills v. Board of Education, 348 F. Supp. 866, 875 (D.D.C. 1972), argued it could not provide an appropriate education to the 18,000 of the district's 22,000 handicapped children in need of a special education because the reallocation of funds to do so would be inequitable to non handicpped. The Court rejected that argument:

> "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School system whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child."

Id., at 876. By its terms the Medicaid program's purpose is to address the risk exposure the identified populations face

with respect to necessary medical services because of insufficient income and resources.[30] Disabled SSI recipients who are more likely to need hospitalization in excess of 14 days than are non-handicapped are only "subsidized" in the sense that a city's homeowners subsidize fire protection for those who live in higher fire risk foothills, or subsidize police protection for those who live in an area with a higher crime rate. Under the terms of the Medicaid statute, equal access relates to the coverage of the risk exposure related to medically necessary inpatient hospital services. A

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[30] See 42 U.S.C. § 1396 quoted in relevant part in section II at p. supra. The "as far as practicable" language therein goes to the State's justification for designing and adhering to a program which disparately impacts on disabled SSI recipients -- a class of handicapped persons defined in terms of the nature and severity of their disability.

design which unfairly distributes risk burdens has unfairly distributed the benefits of risk protection.[31]

III

THE 14-DAY LIMIT ON MEDICAID INPATIENT HOSPITAL SERVICES HAS A DISCRIMINATORY EFFECT ON THE BASIS OF PLAINTIFFS' HANDICAP.

The evidence in this case leads ineluctably to a conclusion that plaintiffs have established a prima facie case of discrimination.

First, the evidence indicates that no thought or consideration was given to the impact on handicapped persons of a reduction from 20 to 14 days in Medicaid

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[31]Even should a fairer distribution of risk protections and burdens result in an adverse impact on the basis of, say, race, no Title VI violation could be made out because no showing could be made that anyone was injured -- i.e., denied a level of inpatient hospital services available to someone else.

inpatient hospital services.[32] At a minimum, the Medicaid statutory requirements of "reasonable standards" and program design in the recipients' "best interests", the identification of SSI recipients as a discrete group among those who are to be categorically linked to the Medicaid program, plus § 504, require the State to consider the impact on the handicapped of a particular method of reducing the cost of benefits. Even disparate treatment discrimination is not limited to situations where there is a discriminatory animus toward persons with disabilities. Being overlooked, avoided, and ignored are among the kinds of discrimination the legislative history

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[32] Jennings v. Alexander, supra, 715 F.2d at 1044.

indicates § 504 sought to address.[33] Thus although the provisions of § 504 and Title XIX when read together impose an obligation to consider the impact on handicapped when designing a method of allocating limited health services

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[33] E.g., "The State governments discriminate by their apathy." Representative Vanick, 119 Cong. Rec. 2999 (1973). See also Pushkin v. Regents of Univ. of Colo., 658 F. 2d 1372 1385 (10th Cir. 1981):

> "It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons."

resources,[34] the state failed to do so.[35] The consequence of that failure was to shift a grossly inequitable burden on a class defined in terms of the nature and severity of their disability: disabled recipients of SSI who because of their disability need inpatient hospital services in excess of 14 days in any one year. Indeed, even a finding of intentional discrimination has been sustained on comparable evidence: statistics indicating a gross disparate impact[36] coupled with a system amenable to abuse.[37]

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[34] See note 22, supra.

[35] See note 32, supra.

[36] See Section IV, infra.

[37] Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280 (1977) (substantial under representation plus "a selection procedure that is

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Second, reducing the Medicaid inpatient hospital services from 20 to 14 days without any provision for exceptions in cases of exigent medical necessity -- such as conditions which would be life threatening in the absence of inpatient hospital services -- operate to deny otherwise qualified handicapped individuals the intended program benefit: medically necessary inpatient hospital services. In Beal v. Doe, 432 U.S. 438 (1977), this Court noted that "serious statutory questions might be presented if a state Medicaid plan

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susceptible of abuse..."); Turner v. Fouche, 396 U.S. 346 (1970) (substantial disparity plus use of subjective criteria to create jury list); Searcy v. Williams 656 F.2d 1003, 1009 (5th Cir. Unit B 1981), aff'd sub nom. Hightower v. Searcy, ___ U.S. ___, 102 S.Ct. 1605 (1982) (failure to appoint blacks to school board, substantial disparity plus "discretionary element in the administration of the legislation."

excluded necessary medical treatment from its coverage" (Id., at 444, 97 S.Ct. at 2371). Although the Court upheld the right of the state to deny nontherapeutic abortions -- namely abortions which were not medically necessary in order to protect the life of the mother, this case raises a strikingly different question. Here the State is denying indisputedly medically necessary services -- inhospital services necessary to protect the life of the recipient -- because the nature and severity of the handicapping conditions calls for inpatient hospital services in excess of 14 days in a given year. While the State has broad discretion in defining what constitutes "medical necessity" consistent with its utilization control responsibilities,[38] certainly that dis-

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[38] 42 U.S.C. § 1396a(a)(30).

cretion does not include defining as no longer medically necessary services needed to protect life simply because of crossing a 14-day threshhold.

Third, the 14-day limitation design of the program denies plaintiffs and the class they represent an opportunity to receive medically necessary services comparable to the opportunity enjoyed by their nonhandicapped peers. Inpatient hospital services benefits are covered on the basis of medical necessity as defined and monitored by the State.[39] Plaintiffs and class members who, because of the nature and severity of their handicapping condition require more than 14 days of hospital services, are denied a level of Medicaid coverage commensurate with their level of medical

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[39] Id.; Beal v. Doe, 432 U.S. 438, 442, 97 S.Ct. 2366, 2370 (1977).

need level. They are denied coverage benefits which are as effective as the coverage provided other recipients whose needs can be met within the 14-day limitation.

IV.

PLAINTIFFS' STATISTICS INDICATING A DISPARITY OF 28 STANDARD DEVIATIONS MADE OUT A PRIMA CASE OF DISPARATE IMPACT ON THE BASIS OF HANDICAP.

A. Evidentiary role of adverse impact statistics

Adverse impact statistical evidence is merely a means for establishing a causal connection between the adverse impact criterion and the adverse impact itself. Adverse impact statistics have been used as evidence establishing discriminatory intent[40] and as evidence

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[40] Castaneda v. Partida, 430 U.S. 482 (1977) (presumption of intentional discrimination in grand jury selection

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establishing that a practice which is fair in form is discriminatory in operation.[41]

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where County's population was 79.1% Mexican-American but only 39% of those summoned in an 11-year period were Mexican-American); Teamsters v. United States, 431 U.S. 324 (1977) (pattern or practice of racially premised hiring for over-the-road line driving positions established inter alia by workforce statistics showing that of the line drivers, .4% were black and .3% latino); Hazelwood School District v. United States, 433 U.S. 299, 306 n.14 (1977) (prima facie case of a practice of discrimination in hiring teachers established inter alia by evidence indicating that although 5.7% of the teachers in the area were black, blacks constituted only 1.4% and 1.8% of the school's teaching workforce over a two-year period -- representing more than six and five standard deviations respectively).

[41] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power, 401 U.S. 424, 432 (1971); Resident Advisory Board v. Rizzo, 564 F.2d 126, 148-150 (3rd Cir. 1977).

Compare Lau v. Nichols, 414 U.S. 563 (1974), where the disparate effect of San Francisco's school system on non-English speaking Chinese students was determined without the need for comparison statistics.

B. Relevant statistics are those relating to Medicaid hospital users

Petitioner/Defendant argues that there is no disparate impact because "95% of all 'eligible' handicapped Medicaid recipients would have all their inpatient hospital needs met as the 14-day limitation."[42] However, reliance on statistics indicating the 14-day maximum has a lesser the impact on the overall medicaid population is misplaced. Persons who are "otherwise qualified" for purposes of the hospitalization medicaid program are those who have satisfied all the medicaid eligibility requirements and who have been determined to need acute level care as evinced by their

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[42]Brief of Petitioners, p. 21.

admission to the hospital. The comparisons of "otherwise qualified" or hospitalization-eligible groups are more finely tuned than are the over-all medicaid population comparisons and therefore a more reliable index.

C. Adverse impact is gross

In the 1979 benchmark year, of the 16,852 handicapped[43] medicaid recipients

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[43]The group classified as "handicapped" are those SSI recipients who are under age 65 and thus receiving SSI solely because of the chronicity and severity of their disability (the statutory standard is inability for a year or more to engage in any substantial gainful activity -- i.e., inability to hold down a minimum wage job) and who were hospitalized under Medicaid in the 1979 benchmark year. The "nonhandicapped" population includes AFDC recipients and 1,833 SSI recipients who are over age 65 and were hospitalized under Medicaid.

than 14 days. The disparity is gross[44] as reflected in the fact that it represents 28 standard deviations -- virtually the same as the 29 standard deviations found to make out a prima facie case of intentional discrimination in Castaneda v. Partida, 430 U.S. 482

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[44]Although the handicapped population constituted one third of the Medicaid recipients who were hospitalized under the program, that population constituted two thirds of those who would be denied an opportunity to realize program benefits comparable to that afforded those whose hospitalization needs could be met within a 14-day limitation. The disparity also would constitute "disparate impact under the 'eighty percent rule' of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission. ... Those guidelines provide that a selection rate that 'is less than [80 percent] of the rate for the group with the highest rate will generally be regarded ... as evidence of adverse impact.' 29 CFR § 1607.4D (1981)." Connecticut v. Teal, 457 U.S. 440, ____ n. 4, 102 S.Ct. 2525, 2529 n. 4 (1982).

(1977).[45] That gross disparity -- which was buttressed by medical testimony[46] -- gives rise to a presumption of a causal connection between protected class status and the adverse impact of the 14-day limitation criterion -- that is, that the differential impact was by reason of the SSI recipients' disability.

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[45]This conclusion is reached by applying the approach detailed in Castaneda v. Partida, 430 U.S. at 496 n. 17: (1) Add together handicapped and nonhandicapped to reach total sample size -- 51,140; (2) add together handicapped and nonhandicapped figures to reach total needing more than 14 days -- 7,279 which is ca. 14.22 percent of the total; (3) Applying 14.22% to the total sample size, the representation of those in the handicapped classification needing more than 14 days should be 2396 (.1422 x 16,852); (4) The amount in excess (difference between those in the handicapped classification actually needing hospitalization and 2396) is 2221; (5) The standard deviation is the square root of 51,140 x .1422 x (1.0 -.1422 or.8578) -- or 79; (6) The number of standard deviations is the differential (2221) divided by 79.

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D. Defendant conceded that its 14-day limitation disparately impacted on the basis of handicap and failed to come forward with any evidence to rebut plaintiffs' statistical proof.

Hazelwood School District v. United States, 433 U.S. 299, 308-13 (1977), tells us that once plaintiffs as here come forward with statistical evidence giving rise to a presumption that the adverse impact on disabled SSI recipients needing hospitalization was because of their protected class status, shifted

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[46]Medical testimony also indicated that the reason the SSI disabled group had greater need of inpatient hospital services was because of their disability. Jennings v. Alexander, supra, 715 F.2d at 1042-44. See also Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795, 800-01 (5th Cir. 1982), which requires a plaintiff as part of his prima facie case to show the causal connection between the protected class status and the adverse impact resulting from the application on the protected class of the criterion at issue -- here the 14-day limitation.

to defendants is a burden of producing evidence to rebut the prima facie statistical proof.[47] While the plaintiff must demonstrate the meaningfulness of the statistical comparisons, they need not present a perfect statistical analysis at the prima facie stage. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977). The district court dismissed the plaintiffs' statistics based on an asserted failure to prove as part of their prima facie case two speculative negatives: One, that the 1979-80 inpatient hospital usage statistics were not aberrational,[48] and two, that the higher level of need for inpatient hospital services was not

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[47] Hazelwood School Dist. v. United States, supra; Dothard v. Rawlinson, 433 U.S. 321, 331 (1977); Craig v. County of Los Angeles, 626 F.2d 659, 664-665 (9th Cir. 1979), cert. denied, 450 U.S. 919 (1981).

[48] Brief of Petitioners at p. 6 indicates Medicaid remained constant from FY 1975-76 through FY 1980-81.

for reasons unrelated to handicap.[49] Although defendants had ample opportunity[50] at trial to rebut plaintiffs' statistical case by arguably more finely tuned, probative statistics,[51]

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[49] Jennings v. Alexander, supra, 518 F.Supp. at 881-882.

[50] Davis v. Califano, 613 F.2d 957, 964 (D.C. Cir. 1980) ("Defending party, with the greater access to statistical evidence of other relevant factors, may utilize such evidence in its rebuttal presentation").

[51] More probative evidence might have resulted from a coupling of the hospital utilization statistics with a random sampling of the utilization control/admission records to determine by days of stay the extent to which hospitalization was related to disability -- i.e., was because of handicap, and the extent to which hospitalization in the senior SSI group included within the nonhandicapped classification was related to disability and therefore also because of handicap. Such disability related determinations are commonly done by states for children and young adults covered by state Crippled Children's Services programs under Title V of the Social Security Act, 42 U.S.C. §§ 701 et seq., to determine whether the hospitalizations would be covered under the program.

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defendants failed to do so suggesting that such statistics would have reinforced plaintiffs' case. Indeed, defendants conceded that the reduction to a 14-day limit would have a disparate impact on the basis of handicap.[52]

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Thus in California bladder infections and decubitus ulcer infections are recognized as related to the status of being para and quadriplegic; pneumonia is recognized as related to a range of disabilities such as cystic fibrosis and chest area paralysis fostering fluid buildup in the lungs. Thus while arguably some of the hospital admissions of the group designated "handicapped" were not for a reason related to their disabilities and therefore a need for hospitalization in excess of 14 days would not be because of handicap, this would be more than offset by hospital admissions from the over-age-65 group among those designated "nonhandicapped" which were in fact related to a disability comparable in terms of the nature and severity to the disabilities of the SSI disabled group.

[52] Jennings v. Alexander, supra, 715 F.2d at 1042, n.7.

Further, as the Court of Appeal noted (715 F.2d at 1043), the statistical evidence was buttressed with "medical testimony which described the inpatient hospitalization pattern of patients with certain handicaps.

CONCLUSION

For the reasons set forth in Respondents' briefs, companion amici briefs, and above, the amici indpendent living centers respectfully urge that the decision of the Sixth Circuit be affirmed.

DATED: JULY 19, 1984

Respectfully submitted,

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APPENDIX

The HHS regulations at 45 C.F.R. § 84.52(a) (1983) under Subpart F--Health, Welfare, and Social Services, provide

> In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap,
>
> (1) Deny a qualified handicapped person these benefits or services;
>
> (2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;
>
> (3) Provide a qualified handiapped person with benefits or services that are not as effective (as defined in § 84.4(b), as the benefits or services provided to others;
>
> (4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or
>
> (5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 84.4(b)(2) provides

> For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of

achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

Section 84.4(b)(4) provides in relevant part

> A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, ...

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copies of the foregoing Brief of the Amici have been mailed this 19th Day of July 1984, to the below-referenced counsel.

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